PUBLIC PROSECUTOR

v.

ENSI BTE MANDANGAN

HIGH COURT SABAH AND SARAWAK, TAWAU
TUAN IAN H.C. CHIN J.
[CRIMINAL TRIAL NO. T(47) - 8 OF 1994]
24 SEPTEMBER 1994

CRIMINAL LAW: Trafficking in cannabis - Section 39B(1)(a) Dangerous Drugs Act 1952 (Revised 1983) - Ingredients - Control and custody -Bags containing cannabis recovered from a boat with 18 passengers on board - Accused seen to have put bags on board - Whether cannabis in the custody and control of the accused.

EVIDENCE: Conflicting evidence by prosecution witnesses on crucial aspect of case - Preference of one for the other - Whether possible in the absence of other evidence - Whether conflicting evidence thereof created reasonable doubt in the case of the prosecution - Best evidence rule - Failure by prosecution to call witnesses who could adduce best evidence - Whether fatal.

The accused was arrested on board a sea carrier (the Tempel) off the waters of Kunak, Lahad Datu, Sabah and was charged with trafficking in 10,935 grams of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1983). The facts showed that at the material time the accused together with 17 other passengers were on their way to Kunak from Bunggao, the Philippines. Evidence had been led which showed that while at Bunggao the accused had come to the Tempel on a small boat and before boarding the Tempel, the accused, together with the oarsman of the said boat, had helped boarded onto the Tempel four bags, which the chemist later confirmed to contain cannabis.

Evidence was further led that on the marine police intercepting the Tempel, the four bags were discovered at the feet of the accused who, at the material time, was seated on a bench near the stern of the boat beside the pilot of the Tempel. According to one Majid, a prosecution witness and a member of the intercepting party, on being asked as to whom the said bags belonged, two to three passengers of the Tempel pointed to the accused. Majid also testified that one of the four bags had a zipper with a padlock on, and according to him, when he asked the accused for the key to the said padlock, the accused handed him two keys with which he opened the bag. It was later confirmed that this padlocked bag contained 4965.5 grams of cannabis.

In the Court, to prove custody and control, beside relying on the evidence of Majid, the prosecution had also relied on the evidence of PW5, a passenger of the Tempel. In effect what PW5 said was that he did not see the accused handing over any keys to Majid and nor did he see anyone among the passengers pointing to the accused as being the owner of the bags. On top of that PW5 also testified that he did not hear Majid asking the questions which Majid said he had asked. The evidence of PW5 thus contradicted the evidence of Majid although both testified for the prosecution.

The prosecution had not called the pilot of the Tempel or the two or three passengers whom Majid alleged had pointed to the accused as being the owner of the four bags to

give evidence. Before the learned Judge, at the end of the case for the prosecution, the issue that arose was whether, on the facts and in the circumstances of this case, custody and control of the four bags, or in any case of the padlocked bag, had been proved against the accused beyond reasonable doubt and hence, whether a case of trafficking in cannabis had been made out for the accused to answer.

Held:

[1] In considering whether the prosecution had proved beyond reasonable doubt that the accused was in control or custody of the bags containing the cannabis, every discrepancy in the evidence of the prosecution will have to be looked at, together with evidence that may possibly be viewed as raising a reasonable doubt, to determine whether such evidence have that effect.

[2] The prosecution had failed to prove beyond reasonable doubt, at the end of its case, that the accused had custody and control of the four bags, or of the padlocked bag, containing the cannabis. On the evidence the prosecution had also failed to prove possession of the bags by the accused.

[3] The mere fact that the accused was conveyed to the Tempel in a small boat together with the cannabis is not sufficient to establish that the accused had custody or control of the cannabis because the small boat was under the control of an oarsman who could have custody or control of the bags. The evidence is still insufficient notwithstanding that the accused was the one who had placed the bags in the Tempel or that the accused had passed the bags to the oarsman of the small boat who in turn placed the same in the Tempel, because the evidence are still open to the inference that the oarsman was the person who was in custody or control or possession of the cannabis, and the four bags might have been conveyed to the Tempel for other persons other than the accused.

[4] The keys are crucial to the whole case because if it can be established beyond reasonable doubt that it was the accused who gave the keys to Majid, then the accused must be taken to have control and custody of the padlocked bag, thereby giving rise to the presumption of possession and knowledge. Trafficking would also then be presumed given the fact that the total net weight of the cannabis in this bag alone was already 4965.5 grams.

[5] The discrepancy between the evidence of PW5 and Majid has fractured the prosecution's case and this was compounded by the failure of the prosecution to call witnesses i.e the pilot and the two or three passengers mentioned by Majid, who would be able to testify as to whether the accused did own up to the padlocked bag or whether the accused did hand over the keys to Majid. These people could provide the best evidence in this case but were not called to give evidence. The result was that the conflict between the evidence of PW5 and Majid in the said crucial particular regarding the keys and the questionings and answers of the accused, could not be resolved. By reason of such failure, there was a doubt in the case of the prosecution as regards whether the accused had handed the keys to Majid, as regards whether other passengers had pointed out the accused to Majid as being the owner of the bag and as regards whether the accused had admitted the ownership of the bag.

[Accused acquitted and discharged].

For the prosecution - Ahmad Kamal bin Md. Shahid, DPP
For the accused - Sunarti binti Nordin

JUDGMENT

Ian H.C. Chin J:

The Charge

Ensi binti Mandangan ("the accused") is charged that she on 29 October 1993, in the waters of Kunak, Tawau, trafficked in 10,935 grams of cannabis. Ms. Sunarti binti Nordin, Counsel for the accused, had submitted that the prosecution had failed to make out a case for the accused to answer. The case commenced on 19 September 1994 and the prosecution, after calling 11 witnesses, closed its case on 23 September 1994, on which latter date submissions were made. I adjourn to today to deliver my judgment.

Evaluation of Prosecution's Evidence

The relevant evidence at the close of the case for the prosecution are these. Elorpe Maglangit ("PW5") was, at about 9.00 a.m., on 28 October 1993, on board a boat called Tempel ("the Tempel") off the shore of Bunggao, in the Philippines, waiting for it to leave for Kunak, Sabah, when the accused came on board *via* a small boat which ferried her to the Tempel. According to PW5, the accused was the last passenger to board the Tempel and that in the small boat which ferried her to the Tempel were four bags which, according to his one version, the oarsman of the small boat put on board the Tempel after the accused had handed the same over to the oarsman while the other version alleged that the bags were brought on board the Tempel by the accused herself. There were altogether 18 passengers on board when the Tempel, in the waters of Kunak, Lahad Datu, was in the early hours of 29 October 1993, intercepted by a marine police patrol boat which had four police officers on board of whom three, Hasnun b. Aron ("Hasnun"), Mohd Mansor b. Hj Johar ("Mansor") and Abdul Majid b. Makarom ("Majid"), testified for the prosecution. The Tempel, upon being directed by Hasnun by the use of a searchlight, came alongside the patrol boat. Majid and Mansor after boarding the Tempel conducted a search of the bags on the Tempel with the aid of torchlights. It was Majid who discovered the four bags which contained a total of 13 packages of dried leaves which a chemist testified to be cannabis. Majid testified that he found the four bags in front and at the feet of the accused who was seated on a bench near the stern of the boat. Majid also said there were people seated to the left and right of the accused. The four bags were respectively (1) a red nylon bag, (2) a striped red, blue and white bag with a zipper and a padlock, (3) a pink raffia bag and (4) a striped blue and white plastic bag and it was in that order that he examined the four bags. It was after he had seen the striped red, blue and white bag with zipper and padlock, the second bag, that he asked the passengers as to whom the bag belongs to. According to Majid, two to three passengers pointed to the accused as being the owner of the bag. Majid then turned to the accused and asked her for the key to open the padlock that was locking the said bag. The accused handed him two keys and Majid used one to open the bag and found 6 cellotaped packages which had the same smell as that of the two packages in the first bag he opened. He closed the zip of the bag and relocked the padlock. Majid continued his search of the remaining two bags which yielded a further, respectively, four and one packages of dried leaves which the said chemist had found to be cannabis. Majid thereafter reported to Hasnun who instructed him to bring the accused and the four bags on board the patrol boat. The patrol boat, with the accused and the four bags, and the Tempel, with the rest of the passengers and the crew, headed for Lahad Datu. The four bags after the patrol boat and the Tempel had reached the jetty in Lahad Datu were

taken to an office where Majid made his markings on the four bags and the 13 packages of cannabis found inside them. Hasnun thereafter took charge of the four bags and their contents and the keys until they were taken to the police station in Lahad Datu and handed over to a Lance Corporal Mardin b. Dali. As for the custody of the cannabis from the time they were recovered from the Tempel until they were produced in Court, it is proved beyond any reasonable doubt that that there is no break in the chain of evidence regarding their safe custody. They have been properly accounted for with every passage of time and properly marked and identified. What has to be decided is whether the prosecution had proved beyond any reasonably doubt that the accused was in custody or control of the 4 bags containing the cannabis.

In considering whether the prosecution had proved, beyond any reasonable doubt that the accused was in control or custody of the four bags containing the cannabis, every discrepancy in the evidence of the prosecution will now be looked at, together with evidence that may possibly be viewed as raising a reasonable doubt, to determine whether such evidence have that effect. This brings me to the evidence of PW5 which I have earlier set out. I will deal with his evidence relating to the boarding of the Tempel by the accused in Bunggao, the Philippines. In this regard, I am of the view that the mere fact that the accused was conveyed to the Tempel in a small boat together with the cannabis is not sufficient as establishing the accused had custody or control or possession of the cannabis because the small boat was under the control of an oarsman who could also have custody or control of the four bags. The evidence is still insufficient notwithstanding that it was the accused who had placed the four bags containing cannabis in the Tempel or that the accused had passed the four bags to the oarsman of the small boat who in turn placed the same in the tempel because the evidence are open to the inference that the oarsman was the person who was in custody or control or possession of the cannabis and the four bags might have been conveyed to the Tempel for other persons other than the accused. It is open to the inference that the bags may have been conveyed for the pilot of the Tempel who was also seated at the same place as the accused. I will pause here to remark that PW5 can hardly be called a reliable witness because he had also said that it was the accused herself who brought the bags on board the Tempel and thus contradicted his evidence that it was the oarsman of the small boat who placed the bags in the middle of the Tempel. It ought also to be noted that PW5 was not satisfactory in his identification of the four bags containing the cannabis. PW5 had initially said he was not able to tell the colour of the bags though later on he correctly described their colour, his evidence, I am inclined to agree with Ms. Sunarti binti Nordin, was suggested by the display of the bags in Court in front of him. This takes me to the discovery of the bag by Majid in the Tempel in the waters of Kunak. Save for PW5, none of the passengers of the Tempel was called to support the allegation of Majid that two or three passengers had said and had pointed to the accused as being the owner of the padlocked red, white and blue striped bag which contained 6 packages of cannabis. PW5 testified he did not hear any police officer asking the passengers any question. PW5 further testified that he did not see the accused give the police anything which again contradicted the evidence of Majid that the accused had given him two keys which enabled Majid to unlock the padlock of the said bag which contained the cannabis. I consider the keys to be crucial to the whole case because if it can be established beyond any reasonable doubt that it was the accused who gave to Majid the keys, which keys, it will be recalled, unlocked the padlock of the bag containing the cannabis, then the

accused must be taken to have control or custody of this bag giving rise to the presumption of possession and knowledge. Trafficking would be also be presumed given the fact that the total net weight of the cannabis in this bag alone was already 4,965.5 grams.

Is there then any doubt that Majid was given the keys by the accused? There are contradictions in the evidence in a very crucial aspect. One of them, PW5 or Majid, must be wrong as to whether the accused handed to Majid the keys. It is implicit in PW5's evidence that the accused did not hand the keys to Majid. There must be cogent reason for the Court to prefer the evidence of one for the other, both being prosecution witnesses. This is even more so if Majid's evidence is preferred to that of PW5 because PW5 had testified that his concentration was on the police officers when they were on the Tempel and while the four bags were being searched and, thus, he would have seen or heard what Majid alleged he had said or what the accused was alleged to have done. An overview will suffice to reveal what the best evidence in this case are and whether they have been produced. All the passengers of the Tempel were brought to the police station in Lahad Datu. The name of the pilot of the Tempel was also revealed in the police report. In fact this potential witness was offered to the defence. PW5 had testified that this pilot was seated beside the accused. Majid had also testified, though somewhat differently, that there were people seated on the same bench to the left and right of the accused. The pilot mentioned by PW5 or the people mentioned by Majid would without any doubt be able to testify whether the accused said the things Majid alleged the accused said and whether the accused handed the two keys to the accused as alleged by Majid. Furthermore, Majid had also testified that 2 to 3 of the passengers had at the time of his search of the bag pointed to the accused as being the owner of the bag. These people could therefore provide the best evidence in this case but they were not called to give evidence with the result that the conflict between the evidence of PW5 and Majid, who are both prosecution witnesses, in the said crucial particular regarding the keys and the questioning and answers of the accused, was not able to be resolved. There is therefore no justification for preferring Majid's evidence to that of PW5 and this has the result of creating a doubt in the case of the prosecution as regards whether the accused had handed the keys to Majid, as regards whether other passengers had pointed out the accused to Majid as being the owner of the bag and as regards whether the accused had admitted the ownership of the bag. In fact, given what I have said, there are more reasons for rejecting Majid's evidence then accepting them since his evidence are not supported by witnesses who should be able to and by witnesses who should have been but were not called.

Even Mansor is of no help when he should be. It will be recalled that Mansor also boarded the Tempel with Majid to conduct the search. Before I proceed to stress the point I think it is necessary to be in perspective as regards the Tempel. A description of the Tempel is necessary to place all the people who were in the Tempel at the relevant time, including Majid and Mansor. The length of the Tempel is about 15.25 metre and it is about 2.45 metre wide. There are two planks placed together across the width of the Tempel towards its stern to serve as a bench. This bench also serves as a barrier between the engine at the stern and the other part of the Tempel. The bow is tapered and is boarded. The Tempel is constructed like a dug-out canoe and save for those who had seats on the said bench, the passengers had to sit or squat on the floor of the Tempel in an area of about 10 metres by 2.45 metres. The passengers would be seated or squatted within the narrow confine of the middle part of the Tempel. All these can be gleaned from

the photographs and sketch of the Tempel produced in Court. Given such a situation, one would expect Mansor to see and hear what was going on in the Tempel notwithstanding the fact that he was searching the bow end of the Tempel. It will be recalled that Majid alleged that, upon finding the padlocked bag, he had asked all the passengers as to whom the said bag belongs to and that 2 to 3 passengers pointed to the accused. If that was the case Mansor must surely have heard and seen that as well. If, as Majid alleged, it was a result of this questioning that the accused had handed Majid the two keys, Mansor must also had witnessed this. But Mansor gave no such evidence which does not help in resolving the said conflict between the evidence of PW5 and Majid.

The prosecution relied on the evidence of PW5 and Majid to prove custody and control. I have already commented on the crucial contradiction in the evidence of PW5 as regards how the four bags came on board the Tempel. Even both versions, that is, it was the accused herself who placed the bags inside the tempel or that it was the oarsman who placed them inside the tempel after being handed the same, cannot amount to custody or control or possession by the accused of the four bags since the handling of the four bags by the accused was fleeting and transient. It would have been a different matter if the prosecution was able to establish beyond any reasonable doubt that it was the accused who handed the keys to Majid which unlocked one of the bags containing cannabis but, as was said already, Majid's evidence had been contradicted by PW5 who implicitly said he did not see any keys being handed over by the accused to Majid. This discrepancy fractured the prosecution's case and this was further compounded by the failure of the prosecution to call witnesses, at the very least the pilot of the Tempel who was seated beside the accused, who were within earshot of the accused and Majid and who would be able to testify as to whether the accused did own up to the bags and as to whether the accused did hand the keys to Majid.

The Verdict

The result is that the prosecution had failed to prove beyond reasonable doubt that the accused had custody or control of the four bags containing the cannabis. There was also no evidence that the accused was in possession of the four bags containing the cannabis. I therefore discharge and acquit the accused. The cannabis is to be destroyed by burning, or by such other method as the Department of Environment may kindly advise, in the compound of the High Court in Tawau and to be witnessed by the Senior Assistant Registrar. The destruction of the cannabis is only to be carried out after the disposal of any appeal or after the expiry of the period for appealing against the decision herein, whichever is later.